CORPORATION LAWYERS

It will be remembered that Jack Cade, as depicted in the second part of Henry Sixth, act iv, scene 2, had his programme of reform. He promised that seven half-penny loaves should be sold for a penny; and the three-hooped pot should have ten hoops; and it should be made a felony to drink small beer; and all the realm should be in common. And then Dick the Butcher makes a suggestion:

Dick: "The first thing we do, let's kill all lawyers."

Cade: "Nay, that I mean to do. Is not this a lamentable thing that of the skin of an innocent lamb should be made parchment? that parchment being scribbled over should undo a man?"

The souls of Jack Cade and Dick the Butcher are still marching on, and demagogues and yellow journalism make just as absurd promises to ignorant hearers and readers, and generally wind up by abusing the lawyers. And as judges are lawyers, or at least ought to be, they come in for their share of diatribe whenever their opinions seem to be inconvenient to the demagogue or the editor. A few days ago a judge in Ohio made a ruling against the prosecution in a corporation case, on the ground that the "fundamental rules of evidence" required him so to rule; and a newspaper a thousand miles away in the southwest berated the judge, and declared that applying the fundamental rules of evidence in a case against a corporation would lead to a revolution. Curiously enough the journal in question is published by a corporation of the usual soulless sort.

A favorite method on the part of demagogues in attacking a political opponent is to call him a corporation lawyer, on the theory apparently that if a member of the bar, no matter how distinguished or upright, has been counsel of a corporation he is practically disqualified to hold office. This is a theory so grotesque that it hardly requires notice from any intelligent person. It is a theory that would have disqualified Jefferson, Hamilton, Jackson, Webster, Calhoun and Lincoln, as well as scores of other distinguished statesmen.

But we are often told that lawyers are in the habit of giving advice to corporations by which those corporations are enabled to evade the law. This is a much more subtile charge, and has imposed upon a good many well-meaning people. Man does not live by bread alone, but very largely on phrases; and the average layman is easily influenced by the phrases we are now considering. It

would seem to be time for members of the bar to deny such charges, and call for proof.

And there is no proof. Of course no one has in view the little shysters and calaboose lawyers who are found on the ragged edge of the profession, and who now and then are sent to the penitentiary. It may be safely affirmed that nine-tenths of our profession are honorable men, just as much so as nine-tenths of the doctors and clergymen. And it is of this respectable portion of the members of the bar that these charges are made. But proof there is none. The writer of this paper has been in practice for several decades, and has never known or heard of an instance where a lawyer belonging to the nine-tenths has give advice to a corporation to enable it to evade the law.

The cry against corporation lawyers is not new. It is only one form of expression on the part of unskilled laymen with respect to the learned professions generally. The hypocrisies of the priest and the pretenses of the physician, as well as the wiles of the lawyer, have been the object of attack for thousands of years. Martial, the satirist of the second century, has two epigrams in which he ridicules counsel in the Roman courts, and which are very modern in tone. We are told that Saint Ives of Brittany is the only lawyer who was ever canonized; and that each year when the peasants celebrate his fête day they sing a hymn with this refrain:[1]

Advocatus, sed non latro,
Res miranda populo.

Which we may translate,

He was an advocate, but not a thief,
A wondrous thing in popular belief.

And the same sentiment is found to-day among those who are either unthinking or perverse. They feel, or pretend to feel, that lawyers at the best are shady people, and constitute a kind of necessary evil. But such has not been the opinion of the great experts from early time. Long ago Celsus defined law to be the art of knowing what is good and just; and Ulpian, as quoted in the Pandecta,[2] commenting on this definition, says that "he speaks well who declares us to be the ministers of justice; and our profession is to know what is good and equitable, and to separate what is equitable from what is iniquitous, distinguishing the lawful from the unlawful." Long after our political bosses and yellow editors shall have been forgotten, the names of Papinian and D'Aguesseau and Erskine

1. Eschbach, Introduction Générale, etc., p. 12.
2. Dig. I, 1, 1.

and Marshall and Kent, and such as they were, will be gratefully remembered as among the elect and precious of history.

But coming more closely to our topic, it must be admitted that corporations are entitled to have counsel, as much so as natural persons. The corporations that publish yellow journals have counsel. And corporations have a right to submit questions of law to such counsel; and it is the duty of counsel to answer these questions frankly and fearlessly without regard to the *dicta* of politicians and editors. The elementary rules of corporation law are comparatively simple and well settled. The trouble is with the interpretation and construction of statutes; and statutes on these subjects are being passed by the hundred. It is said that Hegel was once asked what he meant by a certain profound passage in an earlier work, and replied that he had really forgotten. And so many a legislator would be puzzled to define the meaning of some of his enactments. Corporations could hardly exist without taking expert advice as to the meaning, incidence and validity of such statutes. And yet if the counsel is of opinion that the statute in question does not apply or is, perhaps, itself invalid, the demagogue begins to chatter at once and to declare that such advice is given to enable the client to "evade the law."

It may perhaps be fairly said that there are five classes of cases in which corporations may most often require the advice or advocacy of lawyers.

In the first place, we have the ordinary routine of office work in which advice is given as to the conduct of current business. In this regard it would seem that a railway or industrial company has the same right as a corporation that owns a church or a college, or represents a city. There has been no complaint on this score even from the demagogues.

In the second place, advice may be asked more specifically as to the question whether the company thus applying to counsel is within the terms and scope of a statute. This of course may be of prime importance and must be decided without regard to public clamor. It may be assumed that this was the problem submitted by the American Sugar Refining Company to its legal advisers prior to the litigation in the case of the *E. C. Knight Co. v. The American Sugar Refining Co.*[3] Were the organization and business of the defendant in violation of the Sherman Act of July 2, 1890?[4] We may also assume that the counsel replied in the negative; and in the suit that

3. 156 U. S. 1.
4. 26 Stat. p. 209.

followed both the lower courts and the Supreme Court of the United States decided that the advice was sound.

In the third place advice may be asked as to whether a statute is constitutional. Some years ago many state statutes were adopted on the subject of trusts and combinations. In Louisiana a very drastic act was passed, of this sort, but it wound up with this remarkable statement:[5]

"The provisions of this act shall not apply to agricultural products or live stock in the hands of the producer or raiser; nor be so construed as to affect any combination or confederation of laborers for the purpose of procuring an increase of wages or redress of grievances."

This clause rendered the act unconstitutional, because it denied the equal protection of the laws; and it has remained a dead letter for fourteen years.

In Texas there was a similar statute, infected with a similar vice, and it was declared invalid in the Circuit Court of the United States.[6]

In Nebraska a similar statute contained an exception as to associations of working men, and was declared invalid by the Circuit Court of the United States; and among other reasons because it denied the equal protection of the law to persons not members of labor unions.[7]

In Illinois there was a statute drawn on the same lines, and of equally drastic character, but to which some demagogue added these words: "The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

The Supreme Court of the United States held[8] that this exception caused the act to deny the equal protection of the laws and made it null and void. Were not counsel justified in so advising, prior to the suit? Yet, no doubt, there were people in Illinois who declared that these lawyers were helping a corporation to evade the law.

There is a statute of Congress known as the Erdman Act,[9] which, under the commerce clause of the Constitution, undertakes to prevent interstate carriers from keeping their employees out of labor unions. The United States Court at Louisville has recently declared, in the case of *U. S. v. Scott,* 148 Fed. 431, that the act was unau-

5. Act No. 90, 1882.
6. *In re Grice,* 79 Fed. 627.
7. *Ind. Co. v. Cornell,* 110 Fed. 817.
8. *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, 556.
9. Act of June 1st, 1898, Section 10; 30 Stat. 428.

thorized because it was not a legitimate regulation of interstate commerce. Counsel probably gave a similar opinion in advance of the decision.

Congress has recently passed another act in virtue of the commerce clause,[10] in which the liability of common carriers engaged in interstate business for personal injury to employees is defined, and the doctrine of contributory negligence is annulled. Some counsel have already advised railway companies that the statute is not authorized by the power to regulate commerce between the states. In brief, they claim that because a corporation is "engaged" in such commerce it does not follow that Congress has the power to regulate its acts and liabilities in matters which do not actually pertain to interstate commerce. They may be wrong in their theory, but it will hardly do to say that they are advising their clients so as to enable them to evade the law. They simply propose to ask the court whether the act is valid.

In the fourth place a lawyer may be called on to defend a corporation or its officers in a criminal cause; and when he does so there will be plenty of people to declare that here at least his function is to enable his clients to evade the law. The newspapers will say so, of course, for they have the gift of prophecy; and they will condemn the defendant company before the prosecution is even instituted. While I write these letters an old commercial journal in New York is telling us that the United States is about to begin a criminal proceeding against a large company; that the company is plainly guilty; and that it has not a loophole of escape. This is an easy way to decide a case, but it is hardly in accord with Anglo-Saxon and American ideas of justice and procedure. It is generally considered that the meanest sneak thief or the vilest murderer is entitled to a presumption of innocence, to an orderly trial, and to the assistance of an advocate. A lawyer may properly defend a criminal whom he thinks to be guilty. In Paris, some time ago a different opinion prevailed. The bar there united in refusing to defend a person accused of an atrocious crime, on the ground that he was plainly guilty. After the poor wretch had been condemned and executed it was found that he was innocent. There are many reasons why a lawyer may defend a person who seems to have no real defense. The counsel may be appointed by the court, and be bound to act. The defendant may have confessed to a crime he never committed, for there are examples of that. Or, he may be insane. Or the witnesses for the prosecution may be in a conspiracy to

10. Approved June 11th, 1906.

deceive. Or, as has happened, while an accused person is being tried for murder, and the evidence seems strong, the man alleged to have been murdered comes walking into court. The fact is that the honorable lawyer has the right, and it is often his duty, to defend a corporation accused of an offense. If he state the facts correctly and quote the law correctly, he has a right to apply that law to those facts in favor of his client with such skill as the Lord has given him. And it is a poor compliment to prosecuting officers and judges to assert that such a method of defense enables the client to evade the law.

In the fifth place a lawyer may be called on to defend a corporation in a civil suit; and this fact has been an abundant source of diatribe, especially in the matter of claims against carriers, and actions for personal injury; but the right of counsel to defend a civil suit is plain. No one but a yellow journalist can be perfectly sure of the facts and law of an important and complicated case before it is tried. We all agree that the Supreme Court of the United States is composed of learned and honest men, yet note how they disagree on points of law and fact. I take up at random a recent volume of the reports of that court. It contains forty-three opinions. In eight cases, or nearly twenty per centum, there was dissent. In two cases one justice dissented; in two others two justices dissented; in two others three justices dissented; and finally in two others four justices dissented. Moreover, we all remember the income tax case, the trans-Missouri traffic case, and the insular cases. When very learned men under the responsibility of a great official position can thus differ in regard to the meaning of human language, or even of a single word, the advocate may certainly take sides, in advance of a decision, in perfect good faith. In all important civil litigation there are two sides, and sometimes three or four. There may be honest differences of opinion as to either plaintiff or defendant, and an honorable lawyer may appear for either, provided he does so in accordance with the rules of ethics of the English and American bar. Litigation is a kind of warfare, but war has its laws, its rules of honor, its maxims of chivalry. We are to make war for our clients, but only in honorable ways. We are to state our facts correctly and we are to quote law correctly, and it is in the application of such law to such facts that the skill of advocacy is to be exhibited.

It is especially important that good lawyers should appear for the defense in personal injury cases. It is a melancholy fact, often noted; that there are at every bar certain black sheep, sometimes called "Ambulance Chasers," who promote litigation of that sort,

and are unscrupulous both in the institution of suits and the method of trial. And it is very necessary that they should be opposed by counsel of learning and character, to the end that the real facts and the true law may be brought out and applied.

Of course, my views on this subject may be erroneous, and may be the result of prejudice and prepossession in favor of the nine-tenths of the bar above mentioned. But I venture to express such views; and I would feel obliged to any one who would tell me of a concrete case where a decent counsel has helped a corporation to evade the law. In many cases, perhaps in a majority, where counsel have advised corporations, the advice has been sound. In many instances lawyers have advised corporations that a certain statute did not apply to their clients, and have been sustained by the courts. In other cases they have advised that this or that statute was invalid, and have been sustained by the courts. They have often defended corporations in criminal cases, and have had a perfect right to do so in accordance with the rules of ethics above cited. They have defended corporations in many civil cases, in accordance with the same rules, and have had a perfect right to do so. But demagogues are unscrupulous, and many other laymen are impatient of the orderly processes of law; and so these rightful acts on the part of counsel have been misconstrued into something wrongful.

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